No. 75-545

In the Supreme Court of the United States

OCTOBER TERM, 1975

CARLA A. HILLS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Housing and Urban Development and John R. McDowell, Acting Administrator of the Office of Interstate Land Sales Registration, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-15a), is not yet reported. The Findings of

Fact and Conclusions of Law of the district court are reported at 382 F.Supp. 69 (App. C, *infra*, pp. 18a-33a).

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 16a-17a) was entered on July 30, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Environmental Policy Act requires the Department of Housing and Urban Development to prepare an environmental impact statement before a disclosure statement filed with it by a private real estate developer pursuant to the Interstate Land Sales Full Disclosure Act may become effective.

STATUTES INVOLVED

The relevant portions of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852 *et seq.*, 42 U.S.C. 4321 *et seq.*; and the Interstate Land Sales Full Disclosure Act, 82 Stat. 590 *et seq.*, as amended, 15 U.S.C. 1701 *et seq.* are set out in Appendix D, *infra*, pp. 34a-49a.

STATEMENT

The court of appeals has ruled that the Department of Housing and Urban Development (HUD) and its Office of Interstate Land Sales Registration (OILSR) must prepare an environmental impact statement before a statement of record and property

report filed by a private land developer in accordance with the Interstate Land Sales Full Disclosure Act, 82 Stat. 590 *et seq.*, as amended, 15 U.S.C. 1701 *et seq.* (App. D, *infra*, pp. 37a-44a) may become effective.

The Interstate Land Sales Full Disclosure Act ("the Disclosure Act") was passed in 1968 to prevent abuses in the sale of unimproved tracts of land, by requiring developers to make full public disclosure of information needed by potential buyers. S. Rep. No. 1123, 90th Cong., 2d Sess., p. 109 (1968). The Act is based on the full disclosure provisions of the Securities Act of 1933, which it parallels in many aspects. 111 Cong. Rec. 27310 (1965) (remarks of Senator Williams).[1] Section 1404(a)(1) of the Act makes it unlawful for the developer of a subdivision meeting statutory criteria "to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails * * * to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect * * * and a printed property report * * * is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser." 15 U.S.C. 1703(a)(1) (App. D, *infra*, p. 37a).

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[1] The Disclosure Act was adopted as Title XIV of the Housing and Urban Development Act of 1968, 82 Stat. 476, 590. As proposed by Senator Williams in 1965 and 1967, the Securities and Exchange Commission would have been responsible for its administration. 111 Cong. Rec. 27310-27311 (1965); 113 Cong. Rec. 315-316 (1967).

The statement of record and the property report contain information describing the condition of the subdivision and its state of title. 15 U.S.C. 1705, 1707 (App. D, *infra*, pp. 38a, 43a); 24 C.F.R. Part 1710. The subdivision is registered by filing the statement of record and property report with OILSR; the statement becomes effective automatically on the thirtieth day after filing or such earlier date as the Secretary may determine. 15 U.S.C. 1704, 1706(a) (App. D, *infra*, pp. 37a, 41a); 24 C.F.R. 1710.20, 1710.21. If the Secretary determines that the statement of record is incomplete or inaccurate in any material respect and so notifies the developer within 30 days of filing, the effective date is suspended until the developer files the additional information. 15 U.S.C. 1706(b) (App. D, *infra*, p. 42a).[2]

The statute expressly provides that "[t]he fact that a statement of record with respect to a subdivision has been filed or is in effect shall not be deemed a finding by the Secretary that the statement of record is true and accurate on its face, or be held to mean that the Secretary has in any way passed upon the merits of, or given approval to, such subdivision." 15 U.S.C. 1716 (App. D, *infra*, p. 44a). It also prohibits any person from advertising or representing that the Secretary approves or

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[2] The Secretary also has the power to suspend an already effective statement, after notice and opportunity for hearing, if she determines that it includes an untrue statement of a material fact or omits to state any material fact necessary to make the statement not misleading. 15 U.S.C. 1706(d) (App. D, *infra*, p. 42a).

recommends the subdivision or the sale or lease of lots in it. 15 U.S.C. 1707(b), 1716 (App. D, *infra*, p. 44a).

On February 5, 1974, the Flint Ridge Development Company (Flint Ridge) filed a statement of record and property report with OILSR for a 3,000 lot subdivision adjacent to the Illinois River in Oklahoma. After being notified that the filing did not fully conform to the requirements of Section 1406 of the Act and the regulations, Flint Ridge filed an amended statement of record, which became effective on May 2, 1974.

In the meantime, the respondents, the Scenic Rivers Association of Oklahoma and the Illinois River Conservation Council, filed this action in the District Court for the Eastern District of Oklahoma. They alleged that HUD, by permitting the disclosure statements for the Flint Ridge subdivision to become effective, had engaged in "major federal action significantly affecting the quality of the human environment" under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. 4332(2)(C) (App. D, *infra*, p. 34a); and that HUD must therefore prepare an environmental impact statement before allowing the developer's disclosure statements to become effective.

The district court ordered HUD to prepare an impact statement and "enjoined and restrained [HUD] from approving the * * * filing of Flint Ridge Development Co. until such time as the environmental impact study has been prepared and a

public hearing held thereon." In addition, the court ordered HUD and OILSR to "immediately withdraw the approval of the Flint Ridge Development Co. filing" and, by its own order, declared the filing "suspended, vacated and held for naught" and prohibited all further public sales (App. C, *infra*, pp. 31a, 33a).

On appeal by the federal defendants and Flint Ridge, the court of appeals reversed the district court's holding that there must be a public hearing, but otherwise affirmed the lower court's decision (App. B, *infra*, pp. 16a-17a). In the opinion of the appellate court (App. A, *infra*, pp. 1a-12a), HUD's review of disclosure statements for adequacy under the statute and HUD's regulations (24 C.F.R. Part 1710), constitutes major federal action significantly affecting the quality of the human environment within the meaning of NEPA. A large real estate development, the court said, obviously has an environmental impact. In addition, "[t]he result of [HUD] approval [of disclosure statements] * * * is that the developer is free to seek funds in commerce for the development" (App. A, *infra*, p. 7a). Hence, the court reasoned, this case is analogous to government action in which HUD and other federal agencies approve particular projects, license them, or supply funding or financial guarantees (App. A, *infra*, pp. 6a-9a). The court rejected the government's argument that the statute does not provide for HUD approval, funding or guarantees of developers' proposals, and that its pro-

vision making statements effective within 30 days is inconsistent with NEPA's 75-day minimum period for impact statements (App. A, *infra*, pp. 9a-10a). The limited purpose of the Disclosure Act—to furnish potential buyers with necessary information—is irrelevant, the court ruled, because NEPA requires "attention to environmental problems regardless of whether the agency has authority to do anything about it" (App. A, *infra*, p. 10a).[3] The Act's provision declaring that statements become effective unless suspended was also held irrelevant because, despite the limited suspension authority conferred in the Act, the agency, according to the court, can always suspend them pending the preparation of an impact statement (App. A, *infra*, p. 9a).

REASONS FOR GRANTING THE WRIT

1. The decision below rests on a fundamental misinterpretation of the Interstate Land Sales Full Disclosure Act and Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C). If left standing, the decision will severely interfere with, if not render impossible, the proper administration of the Disclosure Act. Under that Act, HUD currently has on record 7,000 effective filings from developers (of which 871 are from the states comprising the Tenth Circuit) and, if

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[3] The court also held that the Disclosure Act's provision for court of appeals review of orders suspending registrations for incompleteness, inaccuracy, untrue statements or omissions, etc. (15 U.S.C. 1710), were not exclusive; the district court, therefore, had jurisdiction of the NEPA claims under 28 U.S.C. 1331 (App. A, *infra*, pp. 11a-14a).

the court of appeals' reasoning is followed, HUD could be required to prepare an environmental impact statement in regard to each such disclosure statement.[4] The crushing administrative burden this would entail is graphically illustrated by the fact that the number of such environmental impact statements by HUD would exceed the total prepared by all federal agencies during NEPA's first four and a half years.[5] Even if the decision below were confined to future filings, the number of impact statements could be expected to exceed by ten-fold the highest annual number prepared by any agency of the federal government.[6]

Furthermore, the decision has serious implications for other federal agencies with which disclosure statements must be filed. As noted above, the Disclosure

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[4] Moreover, under the decision below, an impact statement might be required whenever a developer files an amendment or a consolidation of prior filings, of which there are approximately 3,000 annually. Hearings on the Department of Housing and Urban Development before a Subcommittee of the House Committee on Appropriations, Part 6, 93d Cong., 2d Sess., p. 1163 (1974).

[5] By June 30, 1974, environmental impact statements had been prepared on 5,430 agency actions, of which 3,344 were final statements and 2,086 were drafts. The Department of Transportation, which has filed the largest number of statements, in 1973 filed a total of 432. *Fifth Annual Report of the Council on Environmental Quality*, pp. 388-391 (1974).

[6] Compare n. 5, *supra*, with the fact that in fiscal year 1974, 652 initial registrations, 520 consolidations and 3,414 amendments were filed. Hearings on the Department of Housing and Urban Development before a Subcommittee of the House Committee on Appropriations, Part 5, 94th Cong., 1st Sess., p. 923 (1975).

Act is patterned on the disclosure provisions of the Securities Act of 1933, 48 Stat. 77-80, as amended, 15 U.S.C. 77e-77h. If, as the court of appeals indicates (App. A, *infra*, p. 8a), the Securities and Exchange Commission must prepare environmental impact statements in regard to offerings of corporate securities, the Nation's private capital markets could be severely affected by the resulting delays.[7]

2. These consequences result, we submit, from the court of appeals' misreading of the statutes involved. Section 102(2)(C) of NEPA requires federal agencies to include an environmental impact statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment * * *." But under the Disclosure Act, HUD makes no "recommendation or report" on a proposal for major federal action—a prerequisite for requiring an environmental impact statement under NEPA. See *Aberdeen & Rockfish R. Co.* v. *SCRAP*, No. 73-1966, decided June 24, 1975, slip op. 26. Indeed, the Disclosure Act (15 U.S.C. 1707(b), 1716 (App. D, *infra*, 44a)) expressly provides that a developer's effective filing is not a determination by HUD of the truth or accuracy of the statements contained therein, or evidence that the agency has in any way passed upon the merits or given approval

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[7] During fiscal 1975, a total of 2,781 registration statements, involving securities offerings with an aggregate value of $77.46 billion, became effective pursuant to the Securities Act of 1933.

to the project. HUD's powers under the Act are limited to assuring that when developers sell lots, they disclose relevant facts to potential purchasers. HUD's performance of this disclosure function does not constitute major federal action within the meaning of NEPA and it does not constitute a report on a proposal for major federal action.

The purpose of NEPA is to assure that federal agencies consider environmental effects along with other factors in their decision-making. S. Rep. No. 91-296, 91st Cong., 1st Sess., pp. 19-20 (1969); 115 Cong. Rec. 40416 (1969). NEPA thus assumes that the relevant federal agency has substantive "go-ahead" authority (*e.g.*, power to approve a project on its merits, licensing authority, or funding responsibilities). See *Biderman* v. *Morton*, 497 F.2d 1141, 1147-1148 (C.A. 2). The Disclosure Act does not confer any such authority on HUD. In administering the Act, HUD grants no approvals to subdivisions, has no planning function, disburses no funds and gives no guarantees, has no control over the design of subdivisions and no power to stop private development. It is not, in any sense, in partnership with the private developer. Cf. *Silva* v. *Romney*, 473 F.2d 287 (C.A. 1). It is concerned only with the adequacy of disclosure to potential purchasers of information relevant to the sale or lease of lots. If the developer makes adequate disclosure, HUD has no discretion to suspend the effectiveness of his statements.

Nor, as the court of appeals erroneously assumed (App. A, *infra*, pp. 6a, 7a-9a), are disclosure state-

ments a legal prerequisite to the initial financing and other pre-sale steps in the development of a subdivision. As was the case here, a developer may be substantially funded well in advance of filing with HUD, and may put in roads, lay out lots, arrange for water and sewage, and start construction on other facilities before he is ready to sell lots. Because the Disclosure Act is a prerequisite only to the sale or lease of lots (15 U.S.C. 1703(a)(1) (App. D, *infra*, p. 37a)), and not to the funding of developments, the actions most significantly affecting the environment can occur well before the developer is required to file his disclosure statements. But even if an effective filing enhances a developer's ability to raise funds in the private capital market, this is irrelevant to the purpose of the Disclosure Act.

The court below appears to have misunderstood the Disclosure Act's purpose and function. Both the statute (15 U.S.C. 1707(b), 1716 (App. D, *infra*, p. 44a)), and its legislative history make clear that HUD was not to pass on the merits of developers' projects in any way. The Act was intended to protect consumers through the process of disclosure, in the same way that the securities law, on which it was modeled, protects investors. Thus in explaining the legislation, Senate Report No. 1123 (*supra*, at 110; emphasis added), provides:

> These requirements mean that the seller of undeveloped land covered by this title would be required to inform the purchaser not only of the desirable aspects but also of any undesir-

> able aspects. The purchaser will then be better able to make an intelligent decision. *This proposal does not authorize the Federal Government to pass upon the quality of what is being sold or upon such questions as land value, land use, or zoning.* Its purpose is to give the purchaser the information necessary to make his own determination of the quality of what is being sold.

The court of appeals' decision substantially frustrates Congress' intention that the Disclosure Act not affect the traditional responsibility of state and local governments for land use planning and substantive regulation of developments.[8] Requiring HUD to suspend developers' filings until it has prepared an environmental impact statement on their project obviously puts a federal agency in the business of passing on the environmental merits of particular subdivisions, thus turning this limited disclosure statute into a federal program of land use control. This transformation is not justified by NEPA. NEPA was not intended to make federal agencies

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[8] Many state and local governments impose environmental regulation upon new subdivisions. See *Fifth Annual Report of the Council on Environmental Quality, supra,* at 49-70. And HUD recognizes that disclosure of some of the environmental aspects of a subdivision is necessary to protect prospective purchasers. It therefore requires such information in the statement of record and property report. The developer must provide information on such factors as roads, water, sewage, drainage, soil erosion, climate, nuisances, natural hazards, municipal services and zoning restrictions. He must also identify all government agencies which regulate the subdivision or which must issue permits which materially affect the subdivision. 24 C.F.R. 1710.105, 1710.110.

"disclose" the environmental effects of private actions over which they have no substantive control.[9]

That NEPA is inapplicable to developers' filings with HUD is further reflected in the Disclosure Act's provision that a statement of record becomes effective automatically 30 days after filing unless the Secretary acts affirmatively, within that time, to suspend it for inadequate disclosure. 15 U.S.C. 1706 (App. D, *infra*, p. 41a).[10] It is inconceivable that in 30 days an environmental impact statement could be prepared, circulated, commented upon, and then reviewed in light of the comments. This time period is inadequate to allow for the kind of careful, long-range planning envisioned by NEPA. The court of

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[9] Because the language and legislative history of the Disclosure Act make clear that it confers on HUD no power to approve, endorse, guarantee, or finance developments, the court of appeals erred in relying on cases under other statutes involving such major federal actions as approvals, licenses, funding or guarantees (App. A, *infra*, pp. 6a-9a). Its error is illustrated by its reliance on *Davis* v. *Morton*, 469 F.2d 593 (C.A. 10), which it described as dealing "with a matter * * * very similar to that here presented" (App. A, *infra*, pp. 6a-7a). That case held that an impact statement was required from the Department of the Interior for a long term lease of Indian lands because the lease was subject to approval, modification or disapproval by the Secretary. No similar substantive regulatory power is granted to, or exercised by, HUD under the Disclosure Act.

[10] Compare Section 8(a) of the Securities Act of 1933, 15 U.S.C. 77h(a), which provides that the registration statement for a securities offering becomes effective twenty days after it is filed in the absence of a delaying amendment by the registrant or a stop order proceeding by the SEC. See *Jones* v. *Securities & Exchange Commission*, 298 U.S. 1, 15-18.

appeals attempted to avoid this problem by holding that "[t]here is nothing in the statute, * * * which prohibits the agency from suspending a statement of record pending the preparation and filing of an impact statement" (App. A, *infra*, p. 9a). On the contrary, the statute expressly limits HUD's suspension power to situations in which the developer has failed to make the required disclosure. 15 U.S.C. 1706 (App. D, *infra*, pp. 41a-42a). The court of appeals' reading of the statute renders the 30-day provision a nullity in regard to every subdivision that has sufficient environmental impact to require some form of environmental clearance. In such cases, no statements of record could go into effect within the 30 days provided by Congress, yet the purpose of that provision, as the court below itself recognized (App. A, *infra*, p. 9a), is to protect developers from costly delays as a result of the need to register with HUD.[11]

3. The Securities and Exchange Commission has advised us that it believes the Court should grant the writ because of the decision's possible adverse effects on securities regulation (see pp. 8-9 *supra*).

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[11] The court also suggested that "a developer could give advance notice to HUD of its intent to sell land in interstate commerce, whereby HUD could commence the preparation of its impact statement" (App. A, *infra*, pp. 9a-10a). Such an approach would not avoid the delays inherent in preparing an impact statement because the agency could not begin to weigh the environmental merits of a project until the developer was ready to begin sales, *i.e.*, when the plans for the subdivision were fully worked out.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 74-1520 and 74-1750

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA and THE ILLINOIS RIVER CONSERVATION COUNCIL, corporations, PLAINTIFFS-APPELLEES

v.

JAMES T. LYNN, Secretary of Housing and Urban Development, and GEORGE K. BERNSTEIN, Administrator of Interstate Land Sales, Department of Housing and Urban Development, DEFENDANTS-APPELLANTS

and

FLINT RIDGE DEVELOPMENT COMPANY, INTERVENING DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 74-131-C)

Before LEWIS, Chief Judge, and MCWILLIAMS and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

This is an appeal from an order, judgment and decree of the United States District Court for the Eastern District of Oklahoma in which the defendants-appellants were enjoined pending the preparation of an environmental impact study "of the effects of the Flint Ridge Development on the quality of the human environment" by the Secretary of Housing and Urban Development and Office of the Interstate Land Sales Registration, a division of the Department of Housing and Urban Development. The essential holding of the trial court was that the responsibilities of the Department of Housing and Urban Development were of such a nature as to require the preparation of an impact statement pursuant to the requirements of the National Environmental Policy Act, 42 U.S.C. § 4331 et seq.

The action herein was filed on April 24, 1974 by the Scenic Rivers Association and the Illinois River Conservation Council. Named as defendants were Lynn, Secretary of the Department of Housing and Urban Development (HUD) and Bernstein, Administrator of the Office of Interstate Land Sales Registration (OILSR). In this suit a declaratory judgment was sought that HUD must conduct an environmental study and file an impact statement prior to its approval of a filing with the OILSR. Also sought was an injunction pending a determination in the case, together with the issuance of a mandatory order compelling the Secretary to comply with NEPA. In addition, plaintiffs sought a preliminary injunction requiring HUD to withdraw approval of the state-

ment of record and property report which had been filed by Flint Ridge Development Company on February 5, 1974.

Flint Ridge was engaged in developing an area along the Illinois River in Oklahoma. In order to do so it was required to file certain documents under the Interstate Land Sales Act, 15 U.S.C. § 1701 et seq. This is a prerequisite to the sale of lots in commerce. The original filing of Flint Ridge was determined to be inadequate and an amended statement of record was filed by Flint Ridge. This was effective as of May 2, 1974, that is, after filing of the present lawsuit.

The order that is now being reviewed was issued following a hearing on preliminary injunction on July 31, 1974. Flint Ridge had been allowed to intervene and the hearing on injunction was merged with the hearing on the merits. Evidence was presented, and on August 2, 1974, the ruling from the bench which was later formalized in findings and opinion held that HUD was required to prepare an impact statement. The court further ordered that the Flint Ridge statement be suspended. Later, on September 4, 1974, the trial court filed its findings of fact and conclusions of law and an order. This enjoined HUD and OILSR from approving the Flint Ridge filing until an environmental impact study had been prepared and a hearing held thereon. The court ordered immediate withdrawal of the approval which had been given May 2 and ordered defendants-appellants to comply with the NEPA procedures.

The effect of the court's orders suspending the statement of record was that it forbade interstate sales until further order of the court. Unquestionably the development would have had a substantial impact on the environment inasmuch as the Illinois River is a state-designated scenic river. Three thousand lots were to have been sold. On each would have been a home with a septic tank for disposal of human refuse, which refuse would have contaminated the river. The trial court considered this fact in determining that the filing with HUD and OILSR was major federal action which would significantly affect the quality of the human environment.

The government agencies and Flint Ridge are the appellants in the present proceedings. They contend that the court erred:

1) In holding that the filing under the Interstate Land Sales Act constituted major federal action;

2) In ruling that an impact statement had to be prepared prior to the approval of a filing. The contention was here that to so read the National Environmental Policy Act is to create an irreconcilable conflict between NEPA and the Interstate Land Sales Act;

3) In requiring a public hearing;

4) In ruling that there was jurisdiction to consider the question as to whether NEPA limited the Interstate Land Sales Act and to enjoin the actions of HUD and OILSR in deference to the provisions of NEPA.

I.

The first question is whether NEPA applies to the actions of the OILSR. The relevant provision of NEPA requires that "to the fullest extent possible" all agencies of the Federal Government shall prepare a detailed environmental impact statement for all "major Federal Actions significantly affecting the quality of the human environment." [1] The defendants-appellants take the position that review of the statements of record which are required to be filed under the Interstate Land Sales Act does not constitute major federal action. As we have above shown, the district court disagreed with this and enjoined OILSR from approving the statement of record until it had filed an impact statement. Therefore, the question boils down to whether the action on the part of OILSR

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[1] The relevant NEPA provision as read in context furnishes a better picture of its requirements:

> The Congress authorizes and directs that, to the fullest extent possible . . . all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

constitutes a major federal action significantly affecting quality of the human environment. The argument is that the action is largely a private one involving as it does the filing of the statement, but it is more than that because OILSR does have the authority to suspend a statement, the effect of which is to cut off raising funds in interstate which would be otherwise available. Thus, this allows the Federal Government to suspend a private action which would unquestionably affect the environment.

Our decision in Davis v. Morton, 469 F.2d 593 (10th Cir. 1972) dealt with a matter which was very similar to that here presented. A 99-year lease of Indian lands was executed by the Pueblo of Tesuque. The lease was to the Sangre de Cristo Development Company, Inc. as lessee. The district court there held that the Secretary of the Interior was not required to file an impact statement prior to approval or disapproval of a lease between the Tribe and the developer. The trial court was impressed by the fact that the United States had not initiated the lease, was not a party, had no interest and the government action was limited to approval or disapproval. Our court reversed, holding that the Secretary's authority to ratify or reject leases on Indian lands would come within the terms of NEPA. The opinion quoted the broad purpose of NEPA as set forth in 42 U.S.C. § 4331 (b) as showing the intention of Congress to preserve the environment.[2] Cited with approval was Greene

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[2] The court said:

> [I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with

County Planning Board v. Federal Power Comm'n, 455 F.2d 412 (2d Cir. 1972), holding that the granting of a license to construct a high voltage line constituted major federal action. Also relied on was Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287 (D.D.C. 1971), requiring the Atomic Energy Commission to prepare an environmental impact statement before issuing an interim operating license for a nuclear power plant.

The similarity between our case and *Davis* is that both involve filing and approval of private action. The result of approval here is that the developer is free to seek funds in commerce for the development. In each instance the filing is a preliminary step which is followed by substantial consequences to the environment; thus, there is action which leads to the development which in turn affects the human environment.

There are many cases which hold that the impact resulting from governmental funds is capable of sig-

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other essential considerations of national policy, to . . . (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings; (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice; . . . .

469 F.2d at 596.

nificantly affecting the quality of the environment, a condition which is not far different from ours.[3]

It is true that funding could be obtained within the State of Oklahoma even without approval, but obviously the obtaining of funds interstate is important. If it were not important, Flint Ridge would not be litigating the present issue.

An analogy is shown in the case of the giving of a guarantee by HUD. This has a significant affect [*sic*]. *See* Sierra Club v. Lynn, 502 F.2d 43 (5th Cir. 1974); Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973). *See, also,* National Resources Defense Council, Inc. v. S.E.C., 389 F. Supp. 689 (D.D.C. 1974) in which it was held that NEPA applies to S.E.C. offerings. The filing with the S.E.C. is not dissimilar to a filing under the Interstate Land Sales Act.

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[3] *See* Proetta v. Dent, 484 F.2d 1146 (2d Cir. 1973) (Economic Development Administration loan commitment to finance a portion of construction costs for expanding a private plant); Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973) (HUD loan and grant); Silva v. Romney, 473 F.2d 287 (1st Cir. 1973) (HUD mortgage guarantee and interest grant for private housing project); San Francisco Tomorrow v. Romney, 472 F.2d 1021 (9th Cir. 1973) (HUD loan and grant); Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (2d Cir. 1972) (Department of Transportation determination to fund highway); City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972) (Federal Aviation Agency funding for airport extension); Upper Pecos Ass'n v. Stans, 452 F.2d 1233 (10th Cir. 1971), *vacated and remanded on other grounds,* 406 U.S. 944 (1972) (Economic Development Administration grant for construction of highway); Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) (Law Enforcement Assistance Administration approval of funds for construction of rehabilitation center).

In sum, then, the consequences of the government's approval of the statement in terms of ease of obtaining funds and in terms of the ultimate direct consequences on the environment of the building of the houses lead to the conclusion that the district court was correct in holding that major federal action significantly affecting the quality of the human environment was present.

II.

Appellants further maintain that the Interstate Land Sales Act is by its terms inconsistent with NEPA in that it requires that the statement of record filed by the land developer become effective 30 days after it is filed unless the agency acts to suspend it, whereas the NEPA procedure has a minimum requirement of 75 days. The argument goes that it is impossible for the Office of Interstate Land Sales to comply. We regard this as superficial. Clearly, Congress put the automatic 30 day provision in the Act out of concern about possible delay in agency action and in turn the interstate land sales. There is nothing in the statute, however, which prohibits the agency from suspending a statement of record pending the preparation and filing of an impact statement. The First Circuit has suggested that HUD promulgate regulations designed to preserve the status quo during the period of preparation of the impact statement. *See* Silva v. Romney, 473 F.2d 287 (1st Cir. 1973). Thus, a developer could give advance notice to HUD of its intent to sell land in interstate commerce, whereby HUD could commence

the preparation of its impact statement. There is evidence that Congress never intended for the 30 day provision to be absolute so as to exclude the applicability of NEPA; evidence the fact that it allowed the statement of record to be suspended.

The other argument advanced is that Congress showed its intention that the NEPA requirement was not applicable. This again loses sight of the fact that the NEPA impact statement requirement applies to virtually all federal agencies and is not limited to those that are concerned with the environment. One of its purposes is to require the giving of attention to environmental problems regardless of whether the agency has authority to do anything about it.[4]

The Supreme Court has held in one case that the ICC was not required to prepare an impact statement. *See* United States v. S.C.R.A.P., 412 U.S. 669 (1973). The ICC had refused on a temporary basis to suspend a proposed rate increase. While it was determining whether the rate increase ought to be suspended permanently, the district court enjoined it from approving the rate increase as to recycled goods until it had filed a NEPA impact statement. By the terms of the statute, however, the rate suspension question was placed in the exclusive juris-

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[4] *See* Jones v. Lynn, 477 F.2d 885, 981 (1st Cir. 1973); Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 787 (D.C. Cir. 1971); Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 833 (D.C. Cir. 1972); National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971).

diction of the ICC during the seven month consideration period as to whether the rate should be suspended. The Supreme Court had so construed the statute in Arrow Transportation Co. v. Southern Ry. Co., 372 U.S. 658 (1963). The fact that the Supreme Court decided to review this case and thus regarded the question whether the ICC *might* have to file a NEPA statement shows the broad sweep and range of the NEPA requirement and demonstrates that it is not to be lightly disregarded. Certainly the presence of the 30-day requirement does not create inconsistency or an impediment to requiring the agency to prepare an impact statement.

Finally, it is readily apparent that these statutes, NEPA and Interstate Land Sales, are not incompatible. Both are designed to give information to the public, but in each instance it is a different kind of information. Rather than being inconsistent or incompatible they complement one another in furnishing the public with a full range of information.

III.

Did the district court lack jurisdiction to hear and determine this matter as a federal question case? We have heretofore recognized that the district court is authorized to entertain a case such as this one arising under federal law. *See* National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971). We there held that the National Helium Corp. could challenge the termination of government contracts, which terminations were taking place without first observing

the requirements of NEPA. In that instance also it was by way of the injunction. National Helium recognized that the underlying substantive federal question was the NEPA requirement. Also, our decision in Davis v. Morton, 469 F.2d 593 (10th Cir. 1972) impliedly held that several kinds of federal violations gave rise to district court jurisdiction to compel the government agency to comply with the mandates of NEPA.

Flint Ridge maintains, however, that the Interstate Land Sales Act has a provision for review by the court of appeals and that this precludes district court action. This statute declares.

> Any person, aggrieved by an order or determination of the Secretary issued after a hearing, may obtain a review of such order or determination in the court of appeals of the United States . . . by filing in such court, within sixty days after the entry of such order or determination, a written petition praying that the order or determination of the Secretary be modified or be set aside in whole or in part . . . Upon the filing of such petition, the jurisdiction of the court shall be exclusive . . . .

15 U.S.C. § 1710(b) [*sic*].

Thus, this Act provides for hearings on the request of a developer when the Secretary suspends the statement prior to its effective date for the purpose of obtaining additional information and, too, for review of an order of the Secretary when he wishes to suspend a statement of record already in effect. 15 U.S.C.

§ 1706(b) and (d). Such hearings are public ones in which a record is made.

It is plain from a reading of the statute that this procedure does not apply here because the agency action for which review is provided has not here taken place and could not take place because it is entirely out of context with the present problem.

Nor does Anaconda v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973) apply. In *Anaconda* the effort was to bypass review by the appropriate court of appeals.

We have examined the other decision relied on, namely, Environmental Defense Fund v. Environmental Protection Agency, 485 F.2d 780 (D.C. Cir. 1973). That one is also plainly inapplicable.

The Supreme Court's decision in *S.C.R.A.P.*, *supra*, is entirely consistent with the position we take because there the effort was to interfere with the decision of an administrative tribunal which Congress and the Supreme Court had recognized was within the exclusive jurisdiction of the tribunal.

The case of Adolphus v. Zebelman, 486 F.2d 1323 (8th Cir. 1973) has recognized that a district court has jurisdiction to enjoin a developer from making interstate land sales when its statement of record violates the Act.

Because, then, of the broad scale application of NEPA and the manifest intention of Congress that all federal agencies with responsibilities which effect

the environment must observe its requirements, the jurisdiction of the district court is present.[5]

IV.

Was the district court correct in its ruling that there should be a public hearing in connection with the environmental impact statement? We agree with HUD that the question whether a public hearing is to be held is within the agency's discretion. The statute does not prescribe that the hearing be either public or adversary. The courts have consistently held to this proposition.[6]

HUD's proposed regulations do not require public hearings in all cases, and the Proposed Rules § 50.20 hold that the question whether a public hearing shall be held on a draft environmental impact statement is an administrative decision. This regulation outlines the factors to be considered: magnitude of the proposal, degree of interest, complexity of the issue and the extent to which public involvement has

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[5] We deem it unnecessary to discuss the issue of standing because it is not seriously contended that the plaintiffs here lacked standing to bring the suit.

[6] Jicarilla Apache Tribe v. Morton, 471 F.2d 1275 (9th Cir. 1973); National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971); Natural Resources Defense Council, Inc. v. TVA, 367 F. Supp. 128 (E.D. Tenn. 1973), *aff'd*, 502 F.2d 852 (6th Cir. 1974); Ford v. Train, 364 F. Supp. 227 (W.D.Wis. 1973); Citizens for Clear Air, Inc. v. Corps of Engineers, U.S. Army, 356 F. Supp. 14 (S.D.N.Y. 1973); City of New York v. United States, 344 F. Supp. 929 (E.D.N.Y. 1972); San Francisco Tomorrow v. Romney, 342 F. Supp. 77 (N.D. Cal. 1972), *rev'd in part on other grounds*, 472 F.2d 1021 (9th Cir. 1973).

been achieved. The appellees contend that the Flint Ridge development meets all the criteria. As noted, however, this is an agency question. The present action is to compel compliance with the mandatory requirements of NEPA. Obviously the holding of a public hearing is not mandatory.

The judgment of the district court is affirmed in all respects except the requirement of a public hearing. That holding is reversed.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM—JULY 30, 1975

Before The Honorable David T. Lewis, Chief Judge, The Honorable Robert H. McWilliams and The Honorable William E. Doyle, Circuit Judges

No. 74-1520

No. 74-1750

(D.C. No. 74-131-C)

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA and THE ILLINOIS RIVER CONSERVATION COUNCIL, corporations, PLAINTIFFS-APPELLEES,

vs.

JAMES T. LYNN, Secretary of Housing and Urban Development, and GEORGE K. BERNSTEIN, Administrator of Interstate Land Sales, Department of Housing and Urban Development, DEFENDANTS-APPELLANTS,

and

FLINT RIDGE DEVELOPMENT COMPANY, INTERVENING DEFENDANT-APPELLANT.

This cause came on to be heard on the record on appeal from the United States District Court for the Eastern District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed in all respects except the requirement of a public hearing. The district court's ruling that there should be a public hearing is reversed. The cause is remanded to the United States District Court for the Eastern District of Oklahoma for further proceedings consistent with the opinion of this Court.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

A true copy

Teste

Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit

/s/ Mary A. Sherman
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
E. D. OKLAHOMA

No. 74-131-C

Sept. 4, 1974

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA and THE ILLINOIS RIVER CONSERVATION COUNCIL, corporations, PLAINTIFFS,

v.

JAMES T. LYNN, Secretary of Housing and Urban Development, and GEORGE K. BERNSTEIN, Administrator of Interstate Land Sales, Department of Housing and Urban Development, DEFENDANTS,

and

FLINT RIDGE DEVELOPMENT CO., a joint venture, INTERVENING DEFENTANT,

and

THE UNITED STATES OF AMERICA ex rel. THE ENVIRONMENTAL PROTECTION AGENCY, ADDITIONAL DEFENDANT.

* * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BOHANON, District Judge.

Statement of Case

The Scenic Rivers Association of Oklahoma, an Oklahoma non-profit corporation, and The Illinois

River Conservation Council, Inc., a non-profit Oklahoma corporation, filed this action in this court for the following reasons:

1. Plaintiffs seek a declaratory judgment decreeing that the Department of Housing and Urban Development, the agency in charge of administering the Interstate Land Sales Act, 15 U.S.C. § 1701 et seq., must, prior to approval and registration of a Statement of Record and Property Report under the Interstate Land Sales Act, conduct an environmental impact study in compliance with the National Environmental Policy Act, 42 U.S.C. § 4331 et seq., and the guidelines of the Council on Environmental Quality and the Department's own guidelines promulgated under the National Environmental Policy Act requirements.

2. Plaintiffs further seek injunctive relief requiring H.U.D. to withdraw approval of Interstate Land Sales filings pending the Environmental Review Process as same pertains to the Property Report and Statement of Record filed by Flint Ridge Development Co. effective May 2, 1974.

Flint Ridge Development Co. joined these proceedings as an intervening defendant on the morning this case was brought to trial, first requesting to appear as *Amicus Curiae*, which request was denied. Then Flint Ridge Development Co. was permitted to intervene as a party defendant with the understanding that it could withdraw at the end of the trial if it chose to do so. The Court finds now that Flint Ridge Development Company may with-

draw if it chooses to do so, but to the knowledge of the Court it has not filed any written request to withdraw from these proceedings so the Court finds that Flint Ridge may or may not remain in the case as it sees fit.

This action is primarily and in all things an action against the defendants James T. Lynn, Secretary of Housing and Urban Development, and George K. Bernstein, Administrator of Interstate Land Sales, Department of Housing and Urban Development, and the United States of America, ex rel the Environmental Protection Agency, for the sole purpose of requiring these governmental agencies to comply with the Acts of Congress relating to environmental protection. This action has two principal issues for the Court to determine:

1. Whether H.U.D.'s action in approving the Property Report and Statement of Record for Flint Ridge Development Co., under the Interstate Land Sales Act, constituted major federal action; and

2. Whether the development itself, together with any peripheral developments associated therewith, would significantly affect the quality of the human environment, of which the Illinois River, its basin and tributaries, is a part.

The Court heard many learned expert witnesses who testified generally and specifically as to the actual potential result of the Flint Ridge Development Co.'s project in the counties of Delaware and Adair, Oklahoma. The Court heard testimony of the Flint Ridge

Development Co., the federal defendant, H.U.D. and the Oklahoma State Departments of Health and Water Resources.

The Court, having carefully examined the files, briefs, pleadings, testimony, exhibits and the issues involved in this case, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. The Illinois River and its basin which is situated in eastern Oklahoma beginning at the western boundary of Arkansas and continuing westerly to Lake Tenkiller near Muskogee, Oklahoma, is within the boundaries of the Eastern District of Oklahoma.

2. The plaintiffs are both residents of the State of Oklahoma and are actively engaged in the preservation of the Illinois River basin and other similar areas in Oklahoma.

3. "Flint Ridge" is a joint venture organized and promoted by Flint Ridge Development Company. The Court finds that Flint Ridge Development Co. has located its joint venture project on the Illinois River basin because of the beauty the river affords for such a development. The attractiveness of the Illinois River basin was and is the motivating factor in Flint Ridge Development Co. seeking out this specific location for promotional purposes.

4. Flint Ridge Development Co. has filed its Statement of Record and Property Report and has divided the property for the purpose of selling to prospective

home builders throughout the United States and has done so by use of the United States mails.

5. Flint Ridge Development Co. proposes to sell 3,000 lots ranging in price from $6,500 to $25,000 per vacant lot. If each lot sold for $6,500, the gross revenue to the development would be $19,500,000; that if all 3,000 lots were sold at $25,000 each, the gross sales would be $75,000,000; that if the gross amounts were added together and divided by two, Flint Ridge Development Co. would have a gross income of $47,250,000. These figures reflect the magnitude of the development and show that H.U.D.'s action in approving the Property Report and Statement of Record under the Interstate Land Sales Act constituted major federal action.

6. Flint Ridge Development Co. is a joint venture composed of Frates Development Company, Tulsa, and Flint Ridge Development Co., Inc. of Tulsa, Oklahoma. Frates Development Company is a subsidiary of Frates Properties, Inc., of Tulsa, Oklahoma, and Flint Ridge Development Co., Inc. is a wholly owned subsidiary of Context Industries, Inc., of Miami, Florida. This joint venture owns the development known as "Flint Ridge" and does business in the Eastern District of Oklahoma.

7. The Department of Housing and Urban Development is a federal instrumentality which, through its sub-agency, the Office of Interstate Land Sales, has statutory and administrative responsibilities for enforcement and administration of the Interstate Land Sales Act.

8. The plaintiff organizations are comprised of individuals and affiliated conservation outdoor organizations. Plaintiffs have filed with the Clerk of this Court a list of several thousands of signatures of individuals living in and around the eastern part of Oklahoma stating and claiming frequent and consistent use of the Illinois River for purposes of hiking, camping, scouting, canoeing, fishing, swimming and general outdoor recreational purposes.

9. The United States Constitution provides that Congress shall regulate Interstate Commerce and Congress saw fit to create the statutory authority for H.U.D. to administer the Interstate Land Sales Act and also to establish the Environmental Protection Agency for the sole purpose of protecting environmental areas for the use of the citizens of this country.

10. The Illinois River is a state-designated "scenic River" and the river as a matter of fact possesses substantial esthetic qualities, which qualities in fact caused Flint Ridge Development Co. to undertake its development in this area.

11. The evidence is clear that the present and proposed development by Flint Ridge Development Co. comprises approximately 7,000 acres, with an ultimate proposal of acquiring an additional 14,000 acres.

12. The Court finds that each lot sold and home built will contain a septic tank for all human refuse. Upon completion of the project 3,000 septic tanks will dispose refuse into the Illinois River. The soil

in this particular area is made up primarily of limestone gravel, chert rock or gravel and clay, and that the soil is very porous and the seepage from the 3,000 septic tanks will soon find its way into the clear waters of the Illinois River and cause pollution damage thereof and destroy forever the environmental quality of the Illinois River Basin.

13. It is important to remember that plaintiffs made demand upon H.U.D. to prepare an environmental impact statement prior to approval of the Statement of Record and Property Report. This H.U.D. refused to do. The Court finds that H.U.D.'s refusal to prepare the environmental impact statement and to perform its duty under the guidelines of the National Environmental Policy Act, the Council of Environmental Quality or its regulations was serious dereliction of its duty imposed upon it by Congress.

14. Flint Ridge Development, together with its peripheral developments has actual or potential substantial effect upon the depth and course of the Illinois River, its tributaries and drainage area, to the plant life, the wildlife habitats, the fish and wildlife, soils, air, esthetics of the area and upon the socio-economic conditions in the area including such matters as health and hospital care and facilities, roads and highways, schools, police and fire protection.

15. Flint Ridge Development Co. is an organization which directly or indirectly sells or leases, or offers to sell or lease, or advertises for sale or lease, lots in a subdivision, containing more than 50 lots,

pursuant to a common sales scheme and in Interstate Commerce.

16. Under the Interstate Land Sales Act the Office of Interstate Land Sales, a sub-agency of the Department of Housing and Urban Development, has the authority and duty to issue rules and regulations providing for an exemption from the provisions of the Act, the authority to review filings under the Act, and to note deficiencies therein (thereby suspending the effectiveness of the filing until such time additional information as the Secretary shall require is provided and the deficiencies corrected), the authority to conduct hearings and make findings and conclusions with respect thereto in connection with filings under the Act, the authority to suspend the effectiveness of the Statement of Record and Property Report under amendments filed subsequent to the effective date of the Act of the filings, the authority to suspend the Statement of Record upon a finding of any untrue statement of a material fact or omission to state any material fact required to be stated or necessary to make the statements not misleading, and the authority to conduct investigations and initiate criminal prosecutions for violation of the provisions of the Interstate Land Sales Act.

That upon the initial filing of the Statement of Record and Property Report by Flint Ridge Development Co., the Office of Interstate Land Sales did in fact find deficiencies and did in fact suspend the effectiveness of the Statement of Record in excess of 30 days from the filing date and according to the

testimony of an official representative of the Office of Interstate Land Sales that Flint Ridge Development Co. was prohibited from selling lots during the period of this suspension.

17. That whenever a Federal agency makes a decision which permits action by other parties, public or private, which will affect the quality of the human environment, such decision constitutes major federal action, which is what occurred in this case. Scientists' Institute for Public Information, Inc. v. A.E.C., 156 U.S.App.D.C. 395, 481 F.2d 1079 (1973).

18. That there is an overriding public interest in preservation of the character of the area described generally as the Illinois River Basin and that the public interest in preserving the character of that ecosystem is one that the plaintiffs may seek to protect by obtaining equitable relief. Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (C.A. 10, 1973).

19. That the Department of Housing and Urban Development by its subagency, the Office of Interstate Land Sales, has not brought its policies and procedures into compliance with requirements of the National Environmental Policy Act, Title 42 U.S.C. Sec. 4333, in that they have no rules, regulations or guidelines promulgated so as to enable them to comply with the National Environmental Policy Act's purposes and intendments.

20. That the defendant, H.U.D., and the Office of Interstate Land Sales, in administering and enforcing the Interstate Land Sales Act and making deci-

sions associated with such administration and enforcement, have not, in whole or in part, complied with any of the mandatory requirements contained in 42 U.S.C. Sec. 4332.

Conclusions of Law

1. The Court has jurisdiction and venue (28 U.S.C. § 1391(e)) over the instant case and the plaintiffs have standing to bring this action.

2. The National Environmental Policy Act applies to all Federal agencies and their subdivisions and requires that all Federal agencies "to the fullest extent possible" must strictly comply with the requirements of the National Environmental Policy Act. The Court further finds as a matter of law that every Federal agency, at the lowest possible level, is required to consider the effects of each decision made by that agency upon the environment and to use all practicable means to avoid environmental degradation. Calvert Cliffs' Coordinating Committee v. A.E.C., 146 U.S.App.D.C. 33, 449 F.2d 1109 (1971); Davis v. Morton, 469 F.2d 593 (C.A. 10, 1972); Ely v. Velde, 451 F.2d 1130 (C.A. 4, 1971); See, National Helium Corporation v. Morton, 455 F.2d 650 (C.A. 10, 1971).

3. There is nothing contained within the Interstate Land Sales Act which specifically excludes N.E.P.A. application. See, Davis v. Morton, *supra.*

4. H.U.D. contends there is no major federal action involved. The concept of major federal action

has evolved from the concept of Federal planning, participation in, funding or benefit from a project. See Natural Resources, Inc. v. Grant, 341 F.Supp. 356 (E.D.N.C., 1972), to include those federal actions taken as a result of an agency decision which permits an action by other parties which will affect the quality of the human environment. Scientists' Institute for Public Information, Inc. v. A.E.C., 156 U.S.App.D.C. 395, 481 F.2d 1079 (1973). Nowhere is the evolution of the concept of major federal action more complete than in the Tenth Circuit. Wyoming Outdoor Coordinating Council v. Butz, 484 F. 2d 1244 (C.A. 10, 1973); Davis v. Morton, *supra*; National Helium Corporation v. Morton, *supra*. These cases hold and reflect that N.E.P.A. is intended to interrupt business-as-usual and to affect the decision-making process at the lowest agency level. N.E.P.A., with its unequivocal command to implement its policy, "to the fullest extent possible" does not render the procedural requirements discretionary. Calvert Cliffs' Coordinating Committee v. A.E.C., *supra;* Ely v. Velde, 451 F.2d 1130 (C.A. 4, 1971).

The decision of the Interstate Land Sales Office to either approve or suspend or to ascertain that deficiencies exist, or have been corrected, in the Statement of Record or Property Report, is major federal action. The case of Davis v. Morton, *supra*, together with the cases cited therein, hold that major federal action exists when the only action was approval by the Government of a project, licensing, permitting a project or enterprise or abandoning a railroad line.

In the *Davis* case the sole federal action involved was an approval, under a delegation of powers, or a lease of Indian lands by a local Department of Interior official.

5. Where a federal license or permit is involved, or where Congress possesses and has utilized its plenary power of regulation under the Interstate Commerce Clause, or other Constitutional authority, federal approval constitutes major federal action. The approval of a filing under the Interstate Land Sales Act is in the nature of a federal license or permit, for without the approval it is unlawful to engage in sales and Congress has exercised its plenary power under the Interstate Commerce Clause by enacting the Interstate Land Sales Act.

6. The National Environmental Policy Act compels Federal agencies to review and reappraise existing policies and procedures in light of developing law and in light of developing agency awareness of environmental factors, 42 U.S.C. § 4332. "The Sweep of N.E.P.A. is extraordinarily broad, compelling consideration of any and all types of environmental impact on federal action," Calvert Cliffs' Coordinating Committee v. A.E.C., *supra.*

7. Plaintiffs must establish an overriding public interest in the preservation of the character of the area under concern and that there is a threat of environmental injury without compliance of N.E.P.A.'s procedures. Wyoming Outdoor Coordinating Council v. Butz, *supra*; Calvert Cliffs' Coordinating Committee v. A.E.C., *supra.* The Court concludes as a matter of law that the plaintiffs have met this burden.

8. One of the burdens of plaintiffs is to demonstrate either actual or potential or threatened results that will significantly affect the quality of the human environment. Wyoming Outdoor Coordinating Council v. Butz, *supra*. The Court further concludes that it is one of the purposes of the National Environmental Policy Act to determine with more exactitude what the actual or potential environmental impacts would be and to take steps to minimize or prevent both long-range and short-range impacts. The Court finds as a matter of law that the plaintiffs have met this burden.

9. As a general rule these impacts include, but are not limited to, effects upon the depth or course of stream, plant life, wildlife habitats, fish and wildlife, soil, the air, the quality of water, social and economic impacts, and effects upon esthetics and recreational opportunities. Natural Resources, Inc. v. Grant, *supra*. The Court notes from its findings of fact and conclusions of law that the plaintiffs have demonstrated actual and potential environmental effects in all of these areas, and therefore, that the decision to approve the Statement of Record and Property Report by H.U.D. of Flint Ridge Development Co. is a major federal action which "significantly affects the quality of the human environment."

10. The Court further concludes, as a matter of law, that any attorney fees and costs to be assessed against the defendant, United States of America, or

the Flint Ridge Development Co. shall be heard and considered upon proper application after the action of this Court has become final or after a final Order of any appellate court.

An appropriate Order and Judgment will be entered accordingly herein.

ORDER, JUDGMENT AND DECREE

Based upon the Findings of Fact and Conclusions of Law this day filed, it is the order, judgment and decree of this court that:

1. The Department of Housing and Urban Development and the Office of Interstate Land Sales be, and they are hereby enjoined and restrained from approving the Interstate Land Sales filing of Flint Ridge Development Co. until such time as the environmental impact study has been prepared and a public hearing held thereon, and further the Department of Housing and Urban Development and the Office of Interstate Land Sales of that Department are hereby ordered to immediately withdraw the approval of the Flint Ridge Development Co. filing which was effective May 2, 1974, and not to reinstate said approval until the further Order of this Court.

2. Plaintiff will post bond in the amount of $100.00.

3. The Department of Housing and Urban Development of the United States Government shall conduct a full, thorough and complete environmental impact study of the effects of the Flint Ridge de-

velopment on the quality of the human environment and that they specifically and in detail address themselves to the following:

(a) The environmental impact of the proposed actions;

(b) Any adverse environmental effects which cannot be avoided should the proposal be implemented;

(c) Alternatives to the proposed action, including no action;

(d) The relationship between the local short-term uses of man's environment and the maintenance and the enhancement of long-term productivity;

(e) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The Department of Housing and Urban Development is further ordered to consult with, and obtain the comments of, any and all other federal agencies which have jurisdiction by law or special expertise with respect to any environmental impact involved.

4. Upon completion of the impact study, a copy thereof shall be filed with this Court.

5. The environmental impact statement shall be made available to the President of the United States, the Council on Environmental Quality and to the public as provided by Title 5 U.S.C. § 552 and Title 42 U.S.C. § 4332(C).

6. The injunction and restraining order set out in paragraph 1 hereof shall be administered by James

T. Lynn, Secretary of Housing and Urban Development and his successor and by George K. Bernstein, Administrator of Interstate Land Sales, Department of Housing and Urban Development and his successor. That a certified copy of this Order shall be served by registered mail upon James T. Lynn and George K. Bernstein at HUD Building, 451 Seventh Street, S.W., Washington, D.C. 20410.

7. It is specifically Ordered that the property report and statement of record filed by Flint Ridge Development Company, a joint venture, be, and the same are hereby suspended, vacated and held for naught, and no further public sales shall be conducted thereunder unless and until further Order of the Court.

A certified copy of this Order shall be delivered by registered mail to Flint Ridge Development Company c/o F. Paul Thieman, Jr., Attorney, 5800 East Skelly Drive, Tulsa, Oklahoma 74135.

APPENDIX D

Sections 102-105 of the National Environmental Policy Act of 1969, 83 Stat. 853-854, 42 U.S.C. 4332-4335, provide as follows:

> SEC. 102 [42 U.S.C. 4332]. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—
>
> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

SEC. 103 [42 U.S.C. 4333]. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

SEC. 104 [42 U.S.C. 4334]. Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of en-

vironmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

SEC. 105 [42 U.S.C. 4335]. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

The Interstate Land Sales Full Disclosure Act, 82 Stat. 590 *et seq.*, as amended, 15 U.S.C. 1701 *et seq.*, provides in pertinent part:

PROHIBITIONS RELATING TO THE SALE OR LEASE OF LOTS IN SUBDIVISIONS

SEC. 1404 [15 U.S.C. 1703]. (a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails—

(1) to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect in accordance with section 1407 and a printed property report, meeting the requirements of section 1408, is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser;

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REGISTRATION OF SUBDIVISIONS

SEC. 1405 [15 U.S.C. 1704]. (a) A subdivision may be registered by filing with the Secretary a statement of record, meeting the require-

ments of this title and such rules and regulations as may be prescribed by the Secretary in furtherance of the provisions of this title. A statement of record shall be deemed effective only as to the lots specified therein.

(b) At the time of filing a statement of record, or any amendment thereto, the developer shall pay to the Secretary a fee, not in excess of $1,000, in accordance with a schedule to be fixed by the regulations of the Secretary, which fees may be used by the Secretary to cover all or part of the cost of rendering services under this title, and such expenses as are paid from such fees shall be considered non-administrative.

(c) The filing with the Secretary of a statement of record, or of an amendment thereto, shall be deemed to have taken place upon the receipt thereof, accompanied by payment of the fee required by subsection (b).

(d) The information contained in or filed with any statement of record shall be made available to the public under such regulations as the Secretary may prescribe and copies thereof shall be furnished to every applicant at such reasonable charge as the Secretary may prescribe.

INFORMATION REQUIRED IN STATEMENT OF RECORD

SEC. 1406 [15 U.S.C. 1705]. The statement of record shall contain the information and be accompanied by the documents specified hereinafter in this section—

(1) the name and address of each person having an interest in the lots in the subdivision to be covered by the statement of record and the extent of such interest;

(2) a legal description of, and a statement of the total area included in, the subdivision and a statement of the topography thereof, together with a map showing the division proposed and the dimensions of the lots to be covered by the statement of record and their relation to existing streets and roads;

(3) a statement of the condition of the title to the land comprising the subdivision, including all encumbrances and deed restrictions and covenants applicable thereto;

(4) a statement of the general terms and conditions, including the range of selling prices or rents at which it proposed to dispose of the lots in the subdivision;

(5) a statement of the present condition of access to the subdivision, the existence of any unusual conditions relating to noise or safety which affect the subdivision and are known to the developer, the availability of sewage disposal facilities and other public utilities (including water, electricity, gas, and telephone facilities) in the subdivision, the proximity in miles of the subdivision to nearby municipalities, and the nature of any improvements to be installed by the developer and his estimated schedule for completion;

(6) in the case of any subdivision or portion thereof against which there exists a blanket encumbrance, a statement of the consequences for an individual purchaser of a failure, by the person or persons bound, to fulfill obligations under the instrument or

instruments creating such encumbrance and the steps, if any, taken to protect the purchaser in such eventuality;

(7) (A) copy of its articles of incorporation, with all amendments thereto, if the developer is a corporation; (B) copies of all instruments by which the trust is created or declared, if the developer is a trust; (C) copies of its articles of partnership or association and all other papers pertaining to its organization, if the developer is a partnership, unincorporated association, joint stock company, or any other form of organization; and (D) if the purported holder of legal title is a person other than developer, copies of the above documents for such person;

(8) copies of the deed or other instrument establishing title to the subdivision in the developer or other person and copies of any instrument creating a lien or encumbrance upon the title of developer or other person or copies of the opinion or opinions of counsel in respect to the title to the subdivision in the developer or other person or copies of the title insurance policy guaranteeing such title;

(9) copies of all forms of conveyance to be used in selling or leasing lots to purchasers;

(10) copies of instruments creating easements or other restrictions;

(11) such certified and uncertified financial statements of the developer as the Secretary may require; and

(12) such other information and such other documents and certifications as the Secretary may require as being reasonably necessary or appropriate for the protection of purchasers.

TAKING EFFECT OF STATEMENTS OF RECORD AND AMENDMENTS THERETO

SEC. 1407 [15 U.S.C. 1706]. (a) Except as hereinafter provided, the effective date of a statement of record, or any amendment thereto, shall be the thirtieth day after the filing thereof or such earlier date as the Secretary may determine, having due regard to the public interest and the protection of purchasers. If any amendment to any such statement is filed prior to the effective date of the statement, the statement shall be deemed to have been filed when such amendment was filed; except that such an amendment filed with the consent of the Secretary, or filed pursuant to an order of the Secretary, shall be treated as being filed as of the date of the filing of the statement of record. When a developer records additional lands to be offered for disposition, he may consolidate the subsequent statement of record with any earlier recording offering subdivided land for disposition under the same promotional plan. At the time of consolidation the developer shall include in the consolidated statement of record any material changes in the information contained in the earlier statement.

(b) If it appears to the Secretary that a statement of record, or any amendment thereto, is on its face incomplete or inaccurate in any material respect, the Secretary shall so advise

the developer within a reasonable time after the filing of the statement or the amendment, but prior to the date the statement or amendment would otherwise be effective. Such notification shall serve to suspend the effective date of the statement or the amendment until thirty days after the developer files such additional information as the Secretary shall require. Any developer, upon receipt of such notice, may request a hearing, and such hearing shall be held within twenty days of receipt of such request by the Secretary.

(c) If, at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement, the developer shall promptly file an amendment thereto. Upon receipt of any such amendment, the Secretary may, if he determines such action to be necessary or appropriate in the public interest or for the protection of purchasers, suspend the statement of record until the amendment becomes effective.

(d) If it appears to the Secretary at any time that a statement of record, which is in effect, includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Secretary may, after notice, and after opportunity for hearing (at a time fixed by the Secretary) within fifteen days after such notice, issue an order suspending the statement of record. When such statement has been amended in accordance with

such order, the Secretary shall so declare and thereupon the order shall cease to be effective.

(e) The Secretary is hereby empowered to make an examination in any case to determine whether an order should issue under subsection (d). In making such examination, the Secretary or anyone designated by him shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the developer, any agents, or any other person, in respect of any matter relevant to the examination. If the developer or any agents shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of an order suspending the statement of record.

(f) Any notice required under this section shall be sent to or served on the developer or his authorized agent.

INFORMATION REQUIRED IN PROPERTY REPORT

SEC. 1408 [15 U.S.C. 1707]. (a) A property report relating to the lots in a subdivision shall contain such of the information contained in the statement of record, and any amendments thereto, as the Secretary may deem necessary, but need not include the documents referred to in paragraphs (7) to (11), inclusive, of section 1406. A property report shall also contain such other information as the Secretary may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of purchasers.

(b) The property report shall not be used for any promotional purposes before the statement of record becomes effective and then only if it is used in its entirety. No person may advertise or represent that the Secretary approves or recommends the subdivision or the sale or lease of lots therein. No portion of the property report shall be underscored, italicized, or printed in larger or bolder type than the balance of the statement unless the Secretary requires or permits it.

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UNLAWFUL REPRESENTATIONS

SEC. 1417 [15 U.S.C. 1716]. The fact that a statement of record with respect to a subdivision has been filed or is in effect shall not be deemed a finding by the Secretary that the statement of record is true and accurate on its face, or be held to mean the Secretary has in any way passed upon the merits of, or given approval to, such subdivision. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to the foregoing.

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